No. 33

In the Supreme Court of the United States

October Term, 1944

Commissioner of Internal Revenue, petitioner

v.

C. C. Harmon

On writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the Tax Court (R. 36–56) is reported in 1 T. C. 40. The opinions of the Circuit Court of Appeals (R. 75–83) are reported in 139 F. (2d) 211.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 2, 1943 (R. 83). The petition for a writ of certiorari was filed on February 28, 1944, and was granted on April 3, 1944 (R. 83). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

On July 29, 1939, Oklahoma adopted a community property statute operative only when husband and wife elect to come thereunder. The taxpayer and his wife, residents of Oklahoma, made such an election effective as of November 1, 1939, and during the remainder of the year received income, consisting of earnings of the husband and gains from the separate property of each spouse, all of which is designated by the Oklahoma statute upon election as "community income". The question for decision is whether, for purposes of the federal income tax, this income may be divided equally between the spouses in separate returns with a consequent reduction in surtaxes.

STATUTES INVOLVED

The statutes involved are set forth in Appendix A, *infra*, pp. 49-56.

STATEMENT

By legislative enactment effective July 29, 1939, the State of Oklahoma adopted a community property law operative only when an election to come under the law is made by the husband and wife. On October 26, 1939, the taxpayer and his wife filed with the County Clerk of Nowata County, Oklahoma, a "community property election", stating that they desired to avail themselves of the Oklahoma Community Property Law and to have the law apply to them and their

property. A certified copy of the election was filed in the office of the Secretary of State of Oklahoma on October 27, 1939. By reason of this election the Oklahoma Community Property Law applied to them and their property on and after November 1, 1939. (R. 37.)

During the period from November 1 to December 31, 1939, inclusive, the taxpayer and his wife received income as set forth in the following table (R. 38):

	Income
Salary of taxpayer	$3,333.34
Dividends from taxpayer's stocks	10,250.50
Dividends from stocks of taxpayer's wife	9,856.00
Interest from obligations due taxpayer	242.50
Distributive share, taxpayer's interests in partnerships	1,214.66
Oil royalty net income of taxpayer	2,744.36
Oil royalty net income of taxpayer's wife	1,969.65
Oil lease net income of taxpayer	9,722.58
Oil lease net income of taxpayer's wife	122.70
Total income	39,426.29

This income, consisting of (a) earnings of the taxpayer, (b) income from the taxpayer's separate property, and (c) in a smaller amount, income from his wife's separate property, is all designated upon election as "community income" under the Oklahoma Community Property Law. The taxpayer and his wife filed separate income tax returns for 1939 in which each reported one-half of the foregoing income.[1] (R. 38.)

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[1] They also divided the deductions attributable to that income (R. 38). No additional question arises with respect to the deductions, the parties being agreed that if the income is to be divided between the spouses, the deductions are like-

The Commissioner ruled that the spouses were not entitled to divide this income between them for purposes of the federal income tax, that the taxpayer was taxable on all of the income derived from his earnings and from his separate property, but on none of the income derived from his wife's separate property, and determined a deficiency of $11,029.95 against the taxpayer[2] (R. 12–21). The Tax Court reversed the Commissioner's determination and held that the spouses were entitled to divide the income in question for purposes of the federal income tax (R. 36–57). The circuit court of appeals, one judge dissenting, affirmed the Tax Court's decision (R. 75–83).

SPECIFICATION OF ERRORS TO BE URGED

1. The circuit court of appeals erred in holding that the Oklahoma Community Property Law is effective to permit the taxpayer to return for federal income taxation only one-half of the in-

wise to be divided, except for one item representing charitable contributions of the taxpayer. The Tax Court held that this item was personal to the taxpayer and, therefore, not an allowable deduction against the community gross income. (R. 51.) The parties are likewise agreed that the Tax Court's holding on this point is correct.

[2] In his determination of the deficiency the Commissioner had also disallowed deductions claimed on account of the worthlessness of certain oil and gas royalty interests. The Tax Court reversed the Commissioner's determination on this point (R. 51–56) and the Government took no appeal from this part of the decision. That question is, therefore, no longer involved in the case.

come derived from his salary and separate property.

2. The circuit court of appeals erred in failing to hold that notwithstanding the Oklahoma Community Property Law, the taxpayer is taxable on all of the income derived from his salary and separate property.

3. The circuit court of appeals erred in affirming the decision of the Tax Court.

SUMMARY OF ARGUMENT

The income in question, representing the taxpayer's earnings and the gains from his separate property, is taxable in full to him, notwithstanding his election to come under the Oklahoma Community Property Law. Those earnings and gains are income "of" the taxpayer within the scope of Sections 11 and 12 of the Internal Revenue Code.

1. The case is governed in principle by *Lucas* v. *Earl*, 281 U. S. 111, and the cases which have followed it, holding assignments of future income to be without effect on the income tax liability of the assignor. The *Earl* case is particularly apposite, since it involved the creation by husband and wife of a joint tenancy in their earnings and gains, pursuant to authorization by state statute.

The rulings in *Poe* v. *Seaborn*, 282 U. S. 101 and companion cases, holding that husband and wife in certain of the traditional community

property states could divide their incomes for federal tax purposes, are inapplicable here for several reasons. In the *Seaborn* case, the rights of the parties with respect to the income were deemed to flow from the marital status itself; here, on the other hand, the community property character of the income is necessarily predicated on an exercise of power by the husband to direct the flow of his income. Moreover, the Oklahoma statute is in no sense the embodiment of an historic social institution reflecting local concepts of the marital relation. At most, it provides a ready means of facilitating transfers of property and income between husband and wife. The legislative background of the statute confirms the evident fact that the elective law marks no transformation in local institutions which could be effective to prevent the ordinary application of the federal income tax law to assignments of income.

In addition, both the federal administrative practice and the scope of the asserted tax liability differ here from those in the *Seaborn* case. There the Treasury had originally regarded community income in the traditional community property states as divisible for tax purposes, and Congress appeared to have acquiesced; also, the liability asserted against the husband was a tax on all the community income, whereas here we seek to tax the husband only on his own earnings and the increment from his separate property.

Our position concerning the pivotal importance of the elective feature of the Oklahoma law is not affected by the fact that in some of the traditional community property states there is a privilege of electing not to have the system apply. To regard the elective features as essentially the same is to make a merely verbal analysis. In the latter states, where there has been no election the husband's earnings have been held divisible for tax purposes on the ground that they are community property by virtue of the marital status itself; upon election, however, the husband's earnings are taxable to him, because their character is thereby brought into conformity with the basic concept of the tax law, which ascribes income to him who earns it or owns its source. In Oklahoma, where there has been no election the earnings of the husband are, of course, taxable to him; after election they remain taxable to him because the very predicate of the election is that but for the agreement they would clearly belong to him, and the agreement is an "exercise of his power to command the income." *Harrison* v. *Schaffner*, 312 U. S. 579, 582. Furthermore, there are practical differences between electing out of and electing into a community property system, since in the former case either spouse may insist on retention of the community system, while in the latter case either spouse may insist on retention of the common-law system. Even if it were assumed

that there is an equivalence between electing into and out of a community system, the result should be, not that Oklahoma residents may divide their incomes for federal tax purposes, but that residents in traditional community property states where election is permitted should be denied the privilege of so dividing their incomes.

2. The foregoing arguments are applicable both to the taxpayer's earnings and to the income from the taxpayer's separate property. With respect to the latter, there is an additional consideration. Such income is taxable in full to the husband by virtue of the principle, repeatedly applied, that although one other than the owner of property has the right to the income therefrom, the income continues to be taxable to the owner of the property from which it is derived. See *Helvering* v. *Clifford*, 309 U. S. 331, 334–335.

3. The Oklahoma statute is ineffective as a tax reducing device for another and basic reason. The statute introduces a system which is community property in name only, and not in its substantive effect. This point is sharply illuminated by a comparison of the Oklahoma system with the orthodox systems and by a comparison of the rights of spouses within Oklahoma who do not elect the community property system with those of spouses who do so elect. These comparisons show that election works no alteration in the wife's interest in the class of income such as is

here involved other than a change in her contingent rights with respect to the devolution of the property. Upon election little more occurs than the appending of the label "community property" upon this income; there is no change in any substantive right which is significant on the question of who shall be taxed upon the current receipt of such income.

ARGUMENT

ELECTION TO COME UNDER THE OKLAHOMA COMMUNITY PROPERTY LAW DOES NOT AFFECT THE INCIDENCE OF THE FEDERAL INCOME TAX. THE TAXPAYER IS CHARGEABLE FOR TAX UPON HIS EARNINGS AND THE INCOME FROM PROPERTY OF WHICH HE IS THE SOLE OWNER

Effective November 1, 1939, the taxpayer and his wife elected to avail themselves of the provisions of the Oklahoma Community Property Law. During the remainder of the year 1939, the taxpayer received income consisting of (a) his earnings and (b) the increment from property of which he was the sole and complete owner. The question for decision is whether this income, which is denominated "community property" by the Oklahoma statute, may be divided equally between the taxpayer and his wife for purposes of the federal income tax so that by filing separate returns they may achieve a reduction in their total tax liability, or whether the taxpayer must report all of it in his own return.

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[3] See *Harmon* v. *Oklahoma Tax Commission*, 189 Okla. 475.

The provisions of the Oklahoma statute are set forth in Appendix A, *infra,* but a brief summary may be helpful. Section 51 provides that the Act is to be available only to those spouses who elect to come thereunder, and Section 52 provides for the method of making the election. Sections 53, 54 and 55 define what property shall be considered the separate property of each spouse. The separate property includes the property of each owned at the date of election, as well as property acquired thereafter by either spouse through gift, devise, or descent, or through division of community property. Section 56 provides that all other property acquired by either spouse after the election (this includes the earnings of each and the income from the separate property of each) shall be "community or common property" and that "subject to the provisions of this Act" each spouse "shall be vested with an undivided one-half interest therein." It further provides that each spouse "shall have the management and control and may dispose of that portion of the community property" consisting of his or her earnings and the income from his or her separate property. The community property under the control of one spouse is subject only to the debts and liabilities incurred by that spouse, and not to the debts and liabilities incurred by the other, and each spouse is entitled to the exemptions to which he or she may be entitled under existing law. (Section 57.) The rights of cred-

itors as against the community property are limited accordingly. (Section 58.) Each spouse is given the power to "give, grant, bargain, sell or convey" to the other any interest in the community property. (Section 59.) In the event of divorce the community property is to be divided in such proportions as the court "shall deem just and equitable". (Section 60.) Upon one spouse becoming incapacitated the other may by court order succeed to the management and control of the community property formerly under the management and control of the incapacitated spouse. (Sections 61, 62, 63, and 64.) Upon the death of one spouse one-half of the net community property remaining goes to the survivor and the other half to the estate of the decedent. (Section 65.)

The Internal Revenue Code and the prior Revenue Acts do not contain provisions dealing specifically with the relation of community systems of marital property rights to the income tax. Resolution of the question herein presented must, therefore, turn on the general provisions of the Code which levy the normal tax and the surtax (Sections 11 and 12, Appendix A, *infra*) upon the "net income of every individual", and which define the term "gross income" to include (Section 22 (a), Appendix A, *infra*)

> gains, profits, and income derived from salaries, wages, or compensation for personal

> service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

The courts below have held that by virtue of the election by the taxpayer and his wife to come under the Oklahoma statute, only one-half of the income here involved is income "of" the taxpayer within the meaning of these provisions. This result was reached in reliance upon *Poe v. Seaborn*, 282 U. S. 101, and its companion cases,[4] which held that in the traditional community property states[5] spouses could divide the community income between them in separate returns.

Since the result of these rulings has been to impose disproportionate and heavier tax burdens upon spouses in all of the other states of the Union, and since the income tax with its progressive rates is based upon ability to pay and is intended to operate uniformly throughout the na-

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[4] *Hopkins* v. *Bacon*, 282 U. S. 122; *Bender* v. *Pfaff*, 282 U. S. 127; *Goodell* v. *Koch*, 282 U. S. 118; see also *United States* v. *Malcolm*, 282 U. S. 792.

[5] Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington.

tion, the decisions have aroused widespread discussion of a critical nature.[6] The result of the community-property decisions has been termed "the best-known and more unfortunate snarl in the entire federal tax system." Paul, *Studies In Federal Taxation* (2d Series) 40. There is, indeed, a substantial body of opinion among stu-

[6] E. g., Haney, J., dissenting in *Black* v. *Commissioner*, 114 F. (2d) 355, 360 (C. C. A. 9):

"The permission to divide the husband's income between the husband and wife in community property states, was probably one of the greatest discriminations against the people of 85% of the states in the union that has recently occurred. Estimates of the loss to the government vary from $9,000,000 to $60,000,000 annually. See Hearings before a Subcommittee of the Committee on Ways and Means, House of Representatives, 73rd Cong., 2nd Sess., on H. R. 8396, pp. 2, 5, 11, 12, 48, 78. An Annual loss of $10,000,000 for 20 years is two hundred millions of dollars. The indications are that the loss has been much greater. The people in the remaining 85% of the states have had to bear the brunt of such patent discrimination. If we are to uphold petitioner here, then there seems to be no reason why all people in non-community property states cannot take advantage of the precedent thus announced—a catastrophe to government finances."

See also the dissenting opinion by the same judge in *Commissioner* v. *Cadwallader*, 127 F. (2d) 547, 550 (C. C. A. 9); S. Rep. No. 673 (Part 1), 77th Cong., 1st sess., p. 9; Paul, *Studies in Federal Taxation* (2d Series) 40-43; Altman, *Oklahoma Community Property Law*, 22 Tax Magazine 260, 262 (1944); Bruton, *The Taxation of Family Income*, 41 Yale L. J. 1172 (1932); Cahn, *Local Law in Federal Taxation*, 52 L. J. 799, 801, 827 (1943); and the materials collected in note 7, *infra*. It should be noted that the tax discrimination described by Judge Haney increases with advances in surtax rates and that the rates have increased substantially since his dissent was written.

dents of the problem that those cases are irreconcilable with an otherwise unbroken line of decisions by this Court, and that consequently if the issue were now presented as an original question, a contrary result would be reached.[7] We do not believe, however, that the issues presented by the instant case necessitate reconsideration of the early community property decisions. For we think that the result reached below proceeds from a fundamental misconception of the meaning and effect of those decisions, and that, in any view of the case, the arrangement which husband and wife have made with the sanction of the Oklahoma statute is ineffective to enable them to divide their aggregate income in equal parts for tax purposes.

A. THIS CASE IS GOVERNED BY LUCAS *v.* EARL AND THE CASES WHICH HAVE FOLLOWED IT. POE *v.* SEABORN AND ITS COMPANION CASES ARE INAPPLICABLE

The controlling principle in the present case is that parties may not by assignment of future income ascribe it for federal tax purposes to one who is not the earner of the income or the owner of the property from which it is derived. This

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[7] Oliver, *Community Property and the Taxation of Family Income*, 20 Tex. L. Rev. 532, 535 (1942); Lowndes, *Community Income and Alimony*, 20 Tax Magazine 3, 5–6 (1942); Ray, *Proposed Changes in Federal Taxation of Community Property: Income Tax*, 30 Cal. L. Rev. 397, 405 (1942); 3 Mertens, *Law of Federal Income Taxation*, Sec. 19.01; 1 Paul, *Federal Estate and Gift Taxation* 62.

principle, which is basic in the application of the federal income tax, has been repeatedly applied in this Court and variously expressed. In *Harrison* v. *Schaffner*, 312 U. S. 579, 580, the Court reaffirmed "the principle that the power to dispose of income is the equivalent of ownership of it and that the exercise of the power to procure its payment to another, whether to pay a debt or to make a gift, is within the reach of the statute taxing income derived from any source whatever."

Lucas v. *Earl*, 281 U. S. 111, is illustrative of the principle and on its facts is essentially similar to the present case. There the taxpayer, a resident of California, contended that he was chargeable for income tax only upon one-half of the salary and attorney's fees earned by him in the years 1920 and 1921, by reason of a contract entered into with his wife in 1901. The contract was an agreement in writing covering both the property then owned by the parties and any which might thereafter be acquired. As to the latter, the contract provided that such after-acquired property, including the earnings of either spouse, "shall be treated and considered and hereby is declared to be received, held, taken, and owned by us as joint tenants, and not otherwise, with the right of survivorship." There was adequate consideration for the agreement, as the taxpayer's wife had about $30,000 worth of prop-

erty at the time of the agreement. The contract was fully adhered to, and the taxpayer's salary and fees were deposited in joint accounts against which his wife had the right to draw at will. Moreover, of special significance in relationship to the present case is the fact that the agreement in the *Earl* case, like that here involved, was made pursuant to specific provisions of state statutes. Section 158 of the California Civil Code provided: "Either husband or wife may enter into any engagement or transaction with the other * * * respecting property, which either might if unmarried." Section 161 provided: "A husband and wife may hold property as joint tenants, tenants in common, or as community property." In short, the California statutes authorized the spouses to establish a relationship of joint tenancy with respect to their property and earnings just as the Oklahoma statute authorizes spouses to establish a community property relationship. While the California statute did not spell out in detail the incidents of joint tenancy, the more elaborate description of community property in the Oklahoma statute is hardly a significant difference from the standpoint of federal taxation.

In *Lucas* v. *Earl*, this Court held that the import of the taxing statute was to tax earnings to their source, despite anticipatory arrangements, however motivated, which would ascribe them "to a different tree from that on which they

grew." 281 U. S. at 115. This basic principle of federal income taxation could not be avoided by the good faith of the parties, the validity and permanence of the arrangement for private purposes, and the explicit sanction for the arrangement in state law.

Lucas v. *Earl* antedated *Poe* v. *Seaborn* but, as was stated in *Burnet* v. *Leininger*, 285 U. S. 136, 142, the ruling in the former "was not disturbed" by the later case. Indeed, the ruling in *Lucas* v. *Earl* was the starting point for a series of decisions in which the same principle was held applicable to a variety of situations. In the *Leininger* case the taxpayer, a member of a partnership, entered into an agreement with his wife that she should share equally with him in the profits and losses from the partnership. It was held that the entire share of the net distributive income from the partnership was nevertheless taxable to the husband. In *Helvering* v. *Horst*, 311 U. S. 112, the owner of a bond bearing negotiable interest coupons made a gift of an unmatured coupon to his son, who upon maturity collected the interest. It was held that the income was taxable to the father. In *Helvering* v. *Eubank*, 311 U. S. 122, an insurance agent made an assignment of renewal commissions which were to become payable to him in the future for services which had already been performed by him in the writing of policies. Even though the assignor was to perform no further services in

order to become entitled to the renewal commissions, it was held that they were taxable to him as they were paid. In *Harrison* v. *Schaffner*, 312 U. S. 579, the life beneficiary of a trust assigned part of the income to another, and despite the argument that there was a transfer *pro tanto* of the beneficiary's property interest, the income was held taxable to the beneficiary. Compare also *Helvering* v. *Clifford*, 309 U. S. 331; *Corliss* v. *Bowers*, 281 U. S. 376.

These decisions would, it is submitted, be undermined if the arrangement in the present case were held to render the income taxable to the respondent's wife. In many states husband and wife have been given by statute absolute freedom to contract with each other. See 3 Vernier, *American Family Laws*, Section 156. In any such state they could contract for the future division of their incomes and, indeed, could write into their contract the identical terms found in the Oklahoma statute. But the decisions make it clear that if in any such state a husband and wife should agree that the wife should be the owner of (a) one-half of his future earnings and (b) one-half of the income from his separate property, all of that income would, despite such an agreement, be taxable to the husband. There is no doubt that such a contract would be ineffective as a tax-saving device. Yet this is, in its essentials, the very situation here presented.

The decision in *Poe* v. *Seaborn*, unlike that in *Lucas* v. *Earl*, has not been the starting point for judicial decisions interpreting and applying the federal income tax law. *Poe* v. *Seaborn* must, at its strongest, be taken as limited to the circumstances there presented. The technical basis upon which it rested was that the income was that of the community by reason of the marital status, whereas in cases like *Lucas* v. *Earl* the very basis of the arrangement presupposed that the income would be that of the grantor save for the transfer. See 282 U. S. at p. 117. The distinction was thus described in *Comer* v. *Davis*, 107 F. (2d) 355, 357 (C. C. A. 5), in discussing the *Seaborn* case: "No assignment was relied upon to create or vest her interest. While her interest may have been derivative, no act of his to transfer and no acceptance by her were necessary to vest it." On the basis of this differentiation, the income in the present case is plainly taxable to the husband, since but for the joint action of himself and his wife it would belong to him.

Moreover, the background of the earlier community property cases differs radically from that presented here. The community property laws of the eight states in which such a system of marital property rights has traditionally obtained long antedated the adoption of the Sixteenth Amendment. See 1 de Funiak, *Principles of Community Property*, C. 4. Their systems are part

of the historic social institutions of those states, and the tax consequences were deemed to flow from that historic system. The Oklahoma statute, on the contrary, is not a manifestation of traditional local concepts of the marital relation. Nor is it an adoption by that state of a transformation of marital property rights upon the creation of the marital status. Oklahoma has retained its former system with respect to marital relationships theretofore or therafter entered into, and has simply provided a ready means by which husband and wife may, if they so wish, alter their property rights. The California legislature had acted similarly in permitting husband and wife to create a joint tenancy, as revealed in *Lucas* v. *Earl*. Other states have provided for other kinds of optional marital property arrangements. Some have facilitated the creation of tenancies by the entirety by authorizing direct conveyances from one spouse to both, without the necessity of an intermediate conveyance, *e. g.*, *Boehringer* v. *Schmid*, 133 Misc. 236; *In re Vandergrift's Estate*, 105 Pa. Super. 293; and in some jurisdictions estates by the entirety may be created in personal property, including bank accounts. *Baker* v. *Baker*, 123 Md. 32; *Klanke's Estate (No. 1)*, 210 Pa. 572. It could not rightly be contended that an anticipatory transfer of earnings to such an estate would produce a different result from that in *Lucas* v. *Earl*. In some jurisdictions, moreover, a wife's earnings,

though presumptively hers, may by her agreement be due to the husband as at common law. See 3 Vernier, *American Family Laws*, p. 193. Such an agreement, it seems clear, would not relieve her of income tax liability. These instances are cited to indicate the principle at stake in the present case. That it concerns an elective community property system rather than an elective system of joint tenancy or tenancy by the entirety or assignment of right to earnings is not significant. While the community property system doubtless embodies a mode of affording support for the family and a measure of security on survivorship at death, it is only one of numerous methods devised for those purposes. The modern statutory rights of married women in their property and earnings, their freedom to contract, the right of support, family-expense statutes, and the statutory right of spouses to inherit are all means to the same end. See R. R. B. Powell, *Community Property—A Critique of Its Regulation of Inter-Family Relations,* 11 Wash. L. Rev. 12. Oklahoma has, at best, made available one mode of arranging marital property rights. Since that mode, if followed by the parties, involves an assignment of earnings and profits, it represents but another form of transfer of income and carries with it the conventional liability for income tax.

The nature of the elective Oklahoma community property system is further revealed by the

fact that, having been elected by the spouses, it is subject to successive alterations at the will of the parties. The community property law specifically reserves to each spouse the power to "give, grant, bargain, sell or convey" to the other "his or her community right, title, interest or estate in all or any property of their community real or personal property" (Sec. 59). The section provides further that any such transfer—

> * * * shall operate to divest the property therein described of every claim or demand as community property, and shall vest the same in the grantee as the separate property of the grantee.

This section has been characterized as one which "cures the apparent defect" of the provision that the community continues until termination of the marriage. Daggett, *The Oklahoma Community Property Act*, 2 La. L. Rev. 575, 577 (1940). In addition, the general statutes of Oklahoma confer unlimited power upon husbands and wives to contract with each other. The characterization of an election as "irrevocable" in the opinions of the Tax Court and the circuit court of appeals (R. 46, 80) thus appears mistaken, and the opinions are weakened to that extent.

Oklahoma Statutes Annotated (1941), Title 32, Section 5; *Cooper v. Bank of Indian Territory*, 4 Okla. 632.

Under a similar statutory provision in California, it is held that spouses may contract that the community property system shall not apply. Civil Code, Secs. 158 and 159; *Siberell v. Siberell*, 214 Cal. 767.

It is thus unreal, we submit, to regard the Oklahoma elective system as a revolutionary change in local conceptions of rights flowing from the marital status, or as anything other than a means of facilitating transfers of income and property between husband and wife. Community of property in Oklahoma is not a mere incident of, nor does it flow from, the marital status of the parties; it flows from their special agreement.

This view of the elective Oklahoma community property system is reinforced by its legislative background. It has been responsibly stated that the objective of the law was the securing of tax advantages for residents of Oklahoma similar to those which obtain in the community property states, particularly Texas. Congressman Disney of Oklahoma has referred to the statute in the following language (House Hearings on the Revenue Act of 1942, 77th Cong., 2d sess., Vol. 2, p. 1336):[1]

> You made reference to Oklahoma. Oklahoma did pass sort of a hybrid community-property law, but the unfortunate part is—and I am disturbed about it from a matter of public policy—it was done for the express purpose of permitting a type of tax avoidance, in collusion with our neighboring State of Texas, for whom we have a lot of respect, for the people there, but that was the object of the bill passed

[1] And see his further statement *id.*, at p. 1364.

> by the legislature. So I am wondering if other States should go forward, and if great States like New York, Pennsylvania, Ohio, Illinois, should do likewise, what a terrific effect it would have on the national revenue.[16]

An excerpt from a letter of Honorable Richard Jones, head of the legal division of the Oklahoma State Tax Commission, appearing in P–H Oklahoma State Tax Service, par. 13001, discloses the following:

> This Bill [Oklahoma Community Property Act] was introduced by Representative Bill Latting from Tulsa, but I understand that in the preparation of this Bill, he had the assistance of several of you tax men who were interested in working out a community property law that would have the effect of stopping an exodus of wealth and capital from our State into the adjoining States of Texas and Louisana, where they could secure the benefits of Community Property in the preparation of their Federal Income Tax Returns.

Campbell and Mosteller, in *Developments Relating to the Oklahoma Community Property Act*, 13 Oklahoma B. A. J. 49 (February 28, 1942), state:

> In an effort to halt this migration [to community property states] the Sixteenth

[16] It should be noted that Oregon in 1943 adopted an elective community property system patterned closely upon the Oklahoma law. Oregon Laws (1943), c. 440.

Session of the Oklahoma Legislature enacted the Oklahoma Community Property Act. * * *

* * * * *

The Community and Intangible Property Acts not only have halted the flight of citizens from the State, but also have influenced new citizens to take up their residence in the State and former residents to return to the State in which their fortunes were made. The latest prominent man so to return is the chief executive of one of our largest independent oil companies, who recently publicly announced that he had reestablished his domicile in Oklahoma.

The primary purpose of the Oklahoma Community Property Act having been accomplished * * *

In Daggett, *The Oklahoma Community Property Act*, 2 La. L. Rev. 575, 576, note 6 (1940), reference is made to letters received by the writer from the Oklahoma Secretary of State, the Dean of the Oklahoma Law School, and an officer of a Texas trust company, all indicating that the Oklahoma Act was enacted to give a federal income tax advantage to Oklahomans and prevent their exodus to Texas. See also Randolph, *Oklahoma Community Property Act of 1939*, 10 Oklahoma B. A. J. 850 (1940).

These statements are not adduced for the purpose of arguing that the Oklahoma statute should be denied effect for local purposes, or that it necessarily fails to alter federal income-tax lia-

bility because of the motives which led to its enactment.[11] The statements are adduced primarily as confirmatory of the actual nature and significance of the elective community property system. Oklahoma has not supplanted the common law as its source for the rules of property between husband and wife. It has not made a fundamental and overriding departure in its conception of the economic relations between spouses, and the husbanding of property upon marriage.[12] It has simply provided a short method whereby private arrangements may be made for allocation of property and income. In this setting we submit that the federal income-tax law should be applied to residents of Oklahoma as it is to the citizens of the other common-law states who may enter into similar arrangements with respect to their income.

Other important differences in the setting of *Poe* v. *Seaborn* and the present case rest in the Federal administrative practice and in the scope of tax liability asserted by the Government. After the enactment of the first income tax following the adoption of the Sixteenth Amendment, the

[11] Compare *Miller* v. *Milwaukee*, 272 U. S. 713; *Macallen* v. *Massachusetts*, 279 U. S. 620, 625–626; *Missouri* v. *Gehner*, 281 U. S. 313; *Schuylkill Trust Co.* v. *Penna.*, 296 U. S. 113; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 392–393; *Tradesmens Bank* v. *Tax Commission*, 309 U. S. 560.

[12] We undertake to show *infra*, pp. 36–48, the insubstantial effect of the Oklahoma system even after election to avail of it. Here we are concerned primarily with the elective feature.

Attorney General ruled that community income could be divided between the spouses in separate returns in all of the traditional community property states except California;[13] the Treasury Department promulgated decisions following these opinions;[14] this was the consistent administrative construction until 1927; and the Court saw in the history of revenue legislation a refusal by Congress to overturn that administrative construction. *Poe* v. *Seaborn, supra*, p. 116. These fac-

[13] 32 Op. A. G. 298 (1920); 32 Op. A. G. 435 (1921). California was excepted on the ground that under its system the wife had no present interest in the community property, but had a mere expectancy only. This conclusion with respect to California was subsequently confirmed in *United States* v. *Robbins*, 269 U. S. 315. However, a series of amendments to the California law (see Section 172a, California Civil Code (1941), added in 1917, providing for the joinder of the wife in conveyances of community real property, and Sections 1401 and 1402, added in 1923, giving each spouse testamentary disposition over one-half of the community property) culminated in the addition to the California Code in 1927 of a provision (Section 161a) defining the wife's right as a "present, existing and equal" interest. When, thereafter, the California situation came before this Court, the Government conceded that *Poe* v. *Seaborn* and its companion cases were controlling. *United States* v. *Malcolm*, 282 U. S. 792. The assumption made in the Government's brief in that case (pp. 7-8) that the California wife had thereby acquired such an interest in the community property as the wife had in Washington is perhaps open to doubt in view of the recent decision in *Grolemund* v. *Cafferata*, 17 Cal. (2d) 679, 111 Pac. (2d) 641, certiorari denied, 314 U. S. 612.

[14] T. D. 3071, 3 Cum. Bull. 221 (1920); T. D. 3138, 4 Cum. Bull. 238 (1921).

tors, which were relied upon as one of the grounds for decision in the *Seaborn* case, are lacking here. From its inception the Commissioner has challenged the efficacy of the Oklahoma statute as a federal tax-saving measure and a search has revealed no legislative history which indicates any Congressional view with respect to the effect of the Oklahoma statute upon the income tax.

In the early community property cases the Government took the position that the husband was liable for tax on all community income, on the ground that he had practical control and enjoyment of it. In all of the cases which came before this Court at that time, part of the income (which was sought to be taxed in its entirety to the husband) was derived from property which was itself owned in community. Furthermore, although none of the cases then before the Court involved earnings of the wife, the Court was of the view that the Government's position, if sustained, would require the inequitable result of taxation of the wife's total earnings to the husband. *Poe* v. *Seaborn*, *supra*, p. 117. In the instant case we do not seek to tax the husband on all of the community income. Indeed, although the husband returned for taxation a share of the gains derived from his wife's separate property, the Commissioner in determining the deficiency herein has excluded from the taxpayer's income any of these gains. We are here merely seeking to tax

(a) earnings to the person who earned them and (b) increment from property to the person who has sole ownership of the property.

The taxpayer has contended that the elective feature of the Oklahoma statute is not a material factor, since in some of the traditional community property states the spouses may elect not to have that system apply for the future, and it has been held that when they do so elect, the Federal tax is to be imposed without regard to the community property system. *Sparkman* v. *Commissioner,* 112 F. (2d) 774 (C. C. A. 9); *Helvering* v. *Hickman,* 70 F. (2d) 985 (C. C. A. 9); *Shoenhair* v. *Commissioner,* 45 B. T. A. 576; *Brooks* v. *Commissioner,* 43 B. T. A. 860. In those cases, however, the election brought the rights of the parties within the normal coverage of the income tax law, which, as has been pointed out, taxes income to the person who earned it. Furthermore, there is no real equivalence for present purposes between electing out of a community property system and electing into one. In the former situation the community property status operates automatically by virtue of the marital relationship, and the tax consequences which have been deemed to follow rest on that fact. See p. 19, *supra.* In the latter situation, on the other hand, the election itself is bottomed upon the fact that the earnings and other income are subject to such power of disposal by the taxpayer,

and it is in recognition of this fact that the case falls within the principle of *Lucas v. Earl*. It may also be observed that in the traditional community property states either spouse may prevent the community property system from being avoided and may thus insist on the benefits of that system, whereas in Oklahoma either spouse may effectively insist upon the retention of the separate property system. Finally, if it be thought that election to come within a community property system must be treated like election to withdraw from the system, it is submitted that the effect in both cases should be that the spouses may not split their incomes for federal tax purposes. In none of the community property income tax cases decided by this Court was the effect of the privilege of electing out of a community system considered. The argument that there is an equivalence between electing in and electing out of the system may constitute a good reason for denial of the privilege of dividing incomes for taxing purposes in all community property states, but it does not constitute a reason for recognizing the privilege of dividing income here.

The taxpayer has also contended for a difference between property rights which have their source in state law and those which have their source in contract between the parties, and it is argued that the present case involves the former. Analysis of the problem, however, is not advanced by speaking in these terms of the ultimate source

of the property rights involved. In any case, as *Lucas* v. *Earl* illustrates, whether the acts of the parties create legal relationships depends upon applicable law. Consequently, the difference between *Lucas* v. *Earl* and *Poe* v. *Seaborn* cannot lie in any supposed dichotomy of the sort suggested.

The Tax Court apparently relied on a similar distinction between rights having their source in law and in contract, but classified the present case in the latter category and reasoned that in the traditional community property states the relationship of the spouses likewise arises from contract. The court said (R. 46) that a marriage "in itself, is a voluntary contract or anticipatory arrangement by which the contracting parties agree that their separate earnings shall beome community income." The court referred (R. 45) to McKay, *Community Property* (2d ed.), Secs. 147–149, who states that in a sense the legal community rests upon a tacit agreement because the spouses are presumed to know the legal consequences of their marriage. However, other descriptions of the relationship are frequent. *E. g.*, 11 American Jurisprudence 178, *Community Property*, Sec. 4: "The community estate is created by law as an incident of marriage; it does not arise from a contract between the parties, * * *." de Funiak (1 *Principles of Community Property*, Sec. 54) describes the "conventional community" as one resting on an

agreement between the spouses and distinguishes it from the "legal community" in that the latter "arises by operation of law upon the marriage of the parties." He states further:

> The form of community property existing in all of our community property states, except Oklahoma and Oregon, is the legal community which by law becomes operative upon marriage of the parties. Community of property in Oklahoma and Oregon cannot accurately be called a legal community because it does not arise by operation of law upon the marriage of the parties but arises only upon the express agreement of the parties. While these states' statutes permit the parties to make such an express agreement, the community of property created by such agreement is the conventional [*i. e.*, contractual] community.

The fact that the taxpayer's argument and the reasoning of the Tax Court reached the same conclusion from contrary premises serves to indicate the unreality of an approach based on an attempted classification of rights according to their source in law or in contract. Rights flowing directly from marriage itself, whether or not denominated a contract, have been held by *Poe* v. *Seaborn* to affect federal tax liability; but rights dependent upon an additional agreement, whether or not denominated as having their source in law,

are governed by the principle of *Lucas* v. *Earl* and related cases.

B. ADDITIONAL CONSIDERATIONS REQUIRE THE TAXATION TO THE HUSBAND OF THE INCOME FROM WHAT IS HIS SEPARATE PROPERTY UNDER OKLAHOMA LAW

The foregoing argument that *Poe* v. *Seaborn* and its related cases are inapplicable applies to all of the income involved in the instant case. However, with respect to that portion of the income which represents the increment from the taxpayer's separate property, as distinguished from his earnings, there are additional considerations. With respect to these items of increment the early community property decisions are in no way applicable, and we submit that these items must be taxed in full to the taxpayer under the principle, often followed, that even though one other than the owner of property has the right to the income therefrom, the income continues to be taxable to the owner of the property from which it is derived. *Helvering* v. *Clifford,* 309 U. S. 331. See also *Burnet* v. *Leininger, supra; Helvering* v. *Horst, supra; Harrison* v. *Schaffner, supra; Helvering* v. *Stuart,* 317 U. S. 154; cf. *Corliss* v. *Bowers, supra.*

Thus, in the *Clifford* case the Court recognized that under local law the trust in question was valid and effective to create full and complete rights in the beneficiary to the income to be derived from the trusteed property. But the grant-

or was held taxable on the trust income, despite the fact that he had completely and irrevocably disposed of it, and this holding was predicated upon the ground that he remained the substantial owner of the corpus.[15] Likewise, in the *Horst* case there was no question but that after the transfer of the coupon the transferor had divested himself of every right represented by it. However, since he remained the owner of the bond, the transferor was held taxable on the coupon payment when it was made. *Harrison* v. *Schaffner* proceeds upon the same theory.

The doctrine of these cases is squarely applicable here. The property from which the income is here sought to be taxed to the husband is admittedly the husband's separate property under the provisions and even the nomenclature of the Oklahoma law. With respect to such property the Oklahoma statute provides (Section 53, Appendix A, *infra*):

> The husband shall have the sole management, control and disposition of his separate property, both real and personal, to the extent permitted by law as to his property prior to the enactment of this Act.

Assuming that the taxpayer's wife has a full and complete interest in half of the income de-

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[15] The Court stated the issue to be (*Helvering* v. *Clifford* at p. 334) "whether the grantor after the trust has been established may still be treated, under this statutory scheme, as the owner of the corpus."

rived from the taxpayer's separate property, and assuming further that her interest is considered as having been derived by operation of state law rather than created by contract, nevertheless all of that income must be taxed to the taxpayer because he is the sole and complete owner of the property from which it is derived.

As we have indicated, the early community property decisions are in no way applicable to this point, for none of them involved the issue which is here raised.[17] Under the Washington, Arizona, and California systems (involved in *Poe* v. *Seaborn*, *Goodell* v. *Koch*, and *United States* v. *Malcolm*, respectively) income from separate property is itself separate property. In *Bender* v. *Pfaff*, which involved the Louisiana system, no separate property was owned by either spouse. In *Hopkins* v. *Bacon*, which arose in Texas, the record does show that part of the income there involved was income from the wife's separate

[16] If the Court should reject our other contentions herein, but sustain our position upon this point, then it would follow that the major portion of the income here involved is taxable in its entirety to the taxpayer. A question would remain, however, with respect to the item of $1,214.66, which is designated "Distributive share, petitioner's interests in partnerships." (R. 38.) The record does not contain any facts upon which a conclusion could be drawn as to whether this item should be treated as compensation for personal services or as a return on a capital investment. A remand to the Tax Court for hearing on this point would, therefore, be appropriate.

property which, by Texas law, was community income. However, no suggestion was made in that case that no part of that income should be taxed to the husband. The Government contended that the husband was taxable on all of it because he had control over it. The taxpayer conceded that he was taxable on one-half of it but contended that he was taxable on no more than that.[17]

C. UNDER THE OKLAHOMA STATUTE ELECTION WORKS NO SUBSTANTIAL CHANGE IN THE RIGHTS OF THE SPOUSES TO INCOME SUCH AS IS HERE INVOLVED, AND THE TAX WAS PROPERLY IMPOSED FOR THIS INDEPENDENT REASON

The Oklahoma statute is ineffective as a tax reducing device for another and basic reason. As the dissenting opinion below concluded (R. 81–83), the statute introduces a system which is community property in name only and not in its substantive effects. Despite its declaration that "subject to the provisions of the Act" each spouse "shall be vested with an undivided one-half interest" (Section 56, Appendix A, *infra*) in the income here involved, no more has been done than to place the label of "community property" on this income. *Cf. Morgan* v. *Commissioner*, 309 U. S. 78. The point is made abundantly clear by a comparison of the Oklahoma system

[17] It should be observed, however, that in the administration of the income tax law in Texas no distinction has been made as to the sources of community income, the spouses having been permitted to divide all of it.

with the orthodox systems of community property and by a comparison of the rights of spouses in Oklahoma who do not elect the community property system with those of spouses who do so elect.

1. *Comparison of the Oklahoma system with the orthodox systems.*—The rights of the spouses under the Oklahoma system differ significantly from those which exist in the orthodox community property states. In concluding, in *Poe* v. *Seaborn*, that the wife was the substantive owner of one-half of the community income, the Court relied upon decisions of the Supreme Court of Washington holding: that community property is not liable for separate obligations of the husband or for his torts not committed in carrying on the business of the community and that the wife could, suing alone, enjoin the collection of his separate debt out of the community property; that the consent of the wife was necessary for the husband to make any substantial gifts out of the property; that the wife could borrow for community purposes and bind the community property; and that the husband's power of management was vested in him simply as agent for the community. Similarly in *Goodell* v. *Koch*; *Hopkins* v. *Bacon*; and *Bender* v. *Pfaff*, decisions of the local courts were relied upon to show that similar attributes characterized the systems of Arizona, Texas and Louisiana. Furthermore, in

many of the orthodox community property states there are explicit statutory limitations upon the husband's control of the community property. Thus in Arizona,[18] California,[19] Idaho,[20] New Mexico[21] and Washington,[22] the wife must join in all conveyances or incumbrances of the community real property. In California[23] and Louisiana[24] the husband is expressly prohibited from disposing of the community property except for a valuable consideration. In Arizona,[25] Louisiana,[26] and Texas[27] the husband is prohibited, during the pendency of divorce proceedings, from disposing of or contracting any debts against the community property.

In Oklahoma, on the other hand, the statute grants broad and unrestricted power to the husband over his earnings and the income from his separate property and there are no decisions by the Oklahoma courts declaring that any limitations exist. Section 56 of the Oklahoma statute provides for the management and control by the wife of community income derived from her earn-

[18] Arizona Code Annotated (1939), Sec. 71–409.
[19] California Civil Code, Sec. 172 (a).
[20] Idaho Code Annotated (1932), Sec. 31–913.
[21] New Mexico Statutes Annotated (1929), Sec. 68–403.
[22] Remington's Revised Statutes (1932), Sec. 6893.
[23] California Civil Code, Sec. 172.
[24] Louisiana Civil Code (1932), Art. 2404.
[25] Arizona Code Annotated (1939), Sec. 27–808.
[26] Louisiana Civil Code (1932), Art. 150.
[27] Vernon's Texas Revised Civil Statutes (1936), Art. 4634.

ings and her separate property and of the community property title to which stands in her name. It then states that: "The husband shall have the management and control and may dispose of all other community property, * * *." The income here involved falls within this last provision and the taxpayer, therefore, has "the management and control and may dispose of" it. Insofar as income from separate property is concerned, this control is implemented by the unlimited control he has over the property itself, the fact that proceeds from its sale constitute his separate income (*Harmon* v. *Oklahoma Tax Commission, supra*) and the fact that the wife has no community succession interest in such property or its proceeds.

No limitation is imposed by Section 56 or any other section of the statute over the husband's powers with respect to his earnings or income from his separate property, and we submit that none may be implied. The taxpayer has suggested that if the issue should arise, the Oklahoma courts would hold that the powers of management, control and disposition may be exercised only as agent or trustee for the community, and would impose equitable limitations upon them. We do not believe that such an assumption is warranted. Certainly the taxpayer cannot upset the Commissioner's determination herein by mere assumptions or assertions as to what the Oklahoma courts might hold concerning these provisions. He must

show clearly and convincingly that actual restrictions do exist under the local law. *Helvering* v. *Fitch*, 309 U. S. 149, 156; *Helvering* v. *Leonard*, 310 U. S. 80, 86; *Pearce* v. *Commissioner*, 315 U. S. 543.[28]

In view of the fact that there are wide differences between the situation in Oklahoma and that in the orthodox community property states, it is by no means clear that the Oklahoma courts would impose any limitations upon the powers of management, control, and disposition granted by the statute. In Washington, for example, all of the community income is under the control of the husband. The imposition of equitable limitations upon his powers with respect to the property is,

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[28] We note that the majority opinion below states (R. 79): "Under the Oklahoma statute both the wife and the husband have management, control and disposition of a portion of the community property, but as the decisions point out this power is exercised by the spouses respectively not as owner but agents of the community created by law."

The decisions referred to in this quotation are the decisions of this Court in *Poe* v. *Seaborn* and its companion cases, which did not, of course, even purport to construe the Oklahoma statute. Since there are no Oklahoma decisions on the point (the only Oklahoma decision under the statute appears to be *Harmon* v. *Oklahoma Tax Commission*, 189 Okla. 475, and it did not deal with this question), of course none were cited to the court below or cited by it in its opinion. Moreover, the composition of the court did not include a judge from Oklahoma. The situation is, therefore, not comparable to that in *Helvering* v. *Stuart*, 317 U. S. 154, in which the circuit court of appeals, after considering a line of Illinois decisions, reached a conclusion upon a point of Illinois law which this Court declined to disturb.

therefore, necessary for the protection of the wife. Similarly, in Texas the judicial limitations upon the husband's power of control have their source in a history which has no counterpart in Oklahoma. In Texas, as late as 1913, the husband had sole power to manage not only all of the community property, but even his wife's separate estate. Indeed, no liability could be incurred by her or enforced even against her separate estate unless she had been authorized to act by her husband. *Gohlman, Lester & Co.* v. *Whittle*, 114 Tex. 548. Therefore, the necessity for limiting the husband's powers of control and disposition in order to afford protection to the wife was even greater in Texas than in Washington and this consideration is reflected in the decisions of the Texas courts which have said that the husband's powers of management are those of a trustee or agent. See *Wright* v. *Hays*, 10 Tex. 130, 133; *Richardson* v. *Hutchins*, 68 Tex. 81, 89. Indeed, in *Wright* v. *Hays*, the court referred to these limitations and duties of the husband as reciprocal to the high powers with which he was vested. But in Oklahoma provision for the protection of the wife has already been made by the legislature by giving her management, control, and the power of disposition over a class of community property equally as broad as that over which the husband has control. In this situation the Oklahoma courts might very well

conclude that there is no reason or necessity for reading any restriction or limitation into the broad language of Section 56. Indeed, they might conclude that it is entirely beyond their province to devise any method of protection for the spouses *inter sese* on the ground that the legislature has dealt with the situation in its own way. We submit that it is a conjecture without foundation to assert that the Oklahoma courts would say that there are limitations upon the powers granted by Section 56.

Even if it should be assumed that the Oklahome courts would read into Section 56 some limitations upon the husband's power of disposition over the class of income here involved, such as denying him the power to make a substantial gift of it without his wife's consent, the wife's interest, nevertheless, remains a very tenuous one. As is pointed out in the dissenting opinion below (R. 82), this is clearly the result of Section 57 of the statute, which provides that that portion of the community property—

> * * * which is under the management, control and disposition of the husband shall be subject to debts contracted by the husband or liabilities of the husband arising out of tort or otherwise, but not the debts or liabilities of the wife.

Thus, if the husband borrowed money or otherwise incurred liabilities, his creditors could reach

this so-called community income, regardless of the use to which the husband had put the money, for the statute provides, in mandatory language, that this income shall be subject to his liabilities, but to none of the wife's. Section 58 goes even further for it provides that if either the husband or the wife should create a community debt, that debt could not be satisfied out of the community property under the control of the other spouse.[29]

2. *Comparison of the rights in Oklahoma of spouses who do not elect the community system with those of spouses who do so elect.*—The point that the Oklahoma statute introduces a community property system in name only and not in its substantive effects, is sharply illuminated by comparison of the rights of spouses who do not elect

[29] There is an ambiguity created by this section and Section 65, which provides that upon the death of one spouse the other shall pay all community debts, whether created by the decedent or the survivor, out of the total community property. The two sections read together may mean either (a) that while both spouses live the community property under the control of one is not subject to liabilities created by the other, but when one dies all of the community property, no matter in whose control, is subject to all community obligations, no matter by whom created; this would treat Section 65 as carving out an exception from Section 58; or (b) that while upon the death of one spouse all of the community property is to be administered as a unit, this is subject to the limitation that the debts created by the decedent may be satisfied only out of that portion of the community property which was under his or her control; this would treat Section 58 as imposing a limitation upon Section 65.

the community property system with those of spouses who do so elect. A graphic presentation of the comparison appears in the table in Appendix B, *infra*.

1. Each non-electing spouse has control over his or her earnings and the increment from separate property. Neither has any interest in the other's property, and debts or liabilities incurred by one spouse may not be satisfied out of the earnings or property of the other.[30] With respect to electing spouses, the situation is precisely the same. (Sections 56, 57 and 58, Appendix, *infra*.) Each has control over the same classes of property which nonelecting spouses control. And the power of one to create liabilities affecting the other is also the same. Even a community debt contracted by one spouse may not be satisfied out of the property under the control of the other, despite the designation of that property as "community property." And a separate debt contracted by one spouse may be satisfied out of the "community property" in his or her control. Moreover, if one spouse should pay a separate debt out of community property, his share in the total community property is not charged therewith. Professor de Funiak has aptly characterized the Oklahoma system by saying (1 Principles of Community Property 458, 459):

> The failure to provide for any adjustment between the spouses when some of the com-

[30] Oklahoma Statutes Annotated, Title 32, Secs. 3, 4, and 9.

munity is seized for the separate debt of one spouse seems to constitute whatever so-called community property is in the hands of each spouse merely the separate property of that spouse, and is not a true community of property.

2. Where there has been no election, upon the abandonment by or imprisonment of one spouse the remaining spouse may, by court action, succeed to the management and control of the property of the other.[31] The situation is the same after election. Upon the abandonment, imprisonment or incapacity of one spouse, the remaining spouse may, by court action, be substituted to the management and control of the community property formerly managed by the other. (Section 61, Appendix, *infra.*)

3. Non-electing spouses have always been able freely to contract with each other respecting their property rights.[32] The community property statute not only does not limit this right for electing spouses insofar as their separate property is concerned, but specifically grants them a like power with respect to their interests in the community property. (Section 59, Appendix, *infra.*)

4. In the event of divorce of nonelecting spouses the wife may have "just and equitable" alimony and where property has been acquired

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[31] *Id.*, Title 32, Sec. 13.

[32] See note 8, p. 22, *supra.*

jointly, the court is empowered to make such division "as may appear just and reasonable".[33] Similarly, with respect to electing spouses, the court is empowered to divide the community property as the court "shall deem just and equitable" (Section 60, Appendix, *infra*), and it seems clear that the election does not affect the wife's right to alimony.

5. Upon the death of a nonelecting spouse, the survivor takes one-half of the estate if there is no more than one child, or, if there is more than one child, takes one-third; this right to intestate succession may not be defeated by will.[34] With respect to electing spouses, upon the death of one the survivor takes one-half of the net community property and the other half passes as part of the decedent's estate. (Section 65, Appendix, *infra.*)

It is evident that the only substantive change worked by the election is in the contingent rights with ~~respect to the~~ devolution of the property. Where the spouses have elected, half of the net community property owned at death will pass as part of the decedent's estate and the survivor will take the other half regardless of the number of children, whereas the survivor of nonelecting spouses will take either one-half or one-third of the net estate, depending upon whether there is more than one child. This is merely a compara-

[33] Oklahoma Statutes Annotated, Title 12, Sec. 1278.
[34] *Id.*; Title 84, Sec. 44.

tively minor deviation from the rights of non-electing spouses in Oklahoma and, in any event, putative rights with respect to the succession to the property have no bearing upon the question of who shall be taxed upon its current receipt. Certainly if Oklahoma had merely amended its laws regulating the devolution of property it could not be maintained that such a change in state law had any effect upon the incidence of the federal income tax.

Since election of the community system operates to give the wife in Oklahoma no greater interest in the class of income such as is here involved than a mere expectancy of a share in whatever remains thereof upon the death of one of the spouses (provided that any has been accumulated), the case is not different from that presented in *United States* v. *Robbins*, 269 U. S. 315. The *Robbins* case, it will be recalled, dealt with the federal tax effect of the California community property system prior to the changes made in the California law,[35] and held that where the wife's interest is no more substantial than it is here, the husband's earnings and other community income are taxable in full to him. Of course in the *Robbins* case the local law did not describe the wife's interest as "vested," whereas here the statute does use this term; but certainly the mere

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[35] See note 13, p. 27, *supra*.

label without the conferring of substantive rights is without significance.

CONCLUSION

For the reasons stated, the judgment below should be reversed.

Respectfully submitted.

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APPENDIX A

Internal Revenue Code:

SEC. 11. NORMAL TAX ON INDIVIDUALS.

There shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax of 4 per centum of the amount of the net income in excess of the credits against net income provided in section 25. (26 U. S. C., Sec. 11.)

SEC. 12. SURTAX ON INDIVIDUALS.

* * * * *

(b) *Rates of Surtax.*—There shall be levied, collected, and paid for each taxable year upon the surtax net income of every individual a surtax as follows: * * *

* * * * *

(26 U. S. C., Sec. 12.)

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

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(26 U. S. C., Sec. 22.)

Oklahoma Statutes Annotated (1941), Title 32:

SEC. 51. *Community property law.—Election to come under act.*—This Act shall be available only to and apply only to husbands and wives and to their property for a period of time from the first day of the month in any year subsequent to their filing their written election to come under the terms of this Act until either an absolute decree of divorce is rendered dissolving their marriage, or until the death of one of them.

SEC. 52. *Election to come under act, form of—Filing.*—The written election to come under the terms of this Act, referred to in Section 1 of this Act, shall be a written instrument signed and acknowledged in duplicate by both husband and wife, stating in substance that they desire to avail themselves of the Act and have same apply to them and to their property on the first day of the next month in any year subsequent to the filing thereof in both the office of the county clerk and the Secretary of State as hereinafter provided. Acknowledgments shall be in the form, and may be taken before any officer now prescribed by law for acknowledgments to conveyances of real estate. One of the said written instruments shall be filed in the office of the county clerk of the county of the residence of the signers thereof, and one in the office of the Secretary of State. The county clerks and the Secretary of State shall cause all such instruments to be recorded in records kept for that purpose, and to be properly indexed.

SEC. 53. *Husband's separate property.*—All property, both real and personal, of the husband owned or claimed by him before

the effective date of the election to come under the terms of the Act, as provided in Section 1 of this Act, and that acquired afterwards, by gift, including gifts of the wife's interest in community property, by division of community property, by devise, or by descent, as also the increase of all lands thus owned or acquired, shall be his separate property. The separate property of the husband shall not be subject to the debts contracted by the wife or liable for her torts, either before or after the effective date of said election, except as may be permitted by law as to his property prior to the enactment of this Act. The husband shall have the sole management, control and disposition of his separate property, both real and personal, to the extent permitted by law as to his property prior to the enactment of this Act.

SEC. 54. *Wife's separate property.*—All property, both real and personal, of the wife owned or claimed by her before the effective date of the election to come under the terms of the Act as provided in Section 1 of this Act, and that acquired afterwards by gift, including gifts of the husband's interest in community property, by division of community property, by devise, or by descent, as also the increase of all lands thus owned or acquired, shall be her separate property. The separate property of the wife shall not be subject to the debts contracted by the husband or liable for his torts, either before or after the effective date of said election, except as may be permitted by law as to her property prior to the enactment of this Act. The wife shall have the sole management, control and disposition of her separate prop-

erty, both real and personal, to the extent permitted by law as to her property prior to the enactment of this Act.

SEC. 55. *Compensation for injuries as separate property.*—All property or moneys received as compensation for personal injuries sustained either by the husband or the wife shall be the separate property of the person sustaining such injuries.

SEC. 56. *Property deemed community or common property—Control-bank deposits.*—All property acquired by the husband or the wife after the effective date of the election to come under the terms of the Act as provided in Section 1 of this Act, except that which is separate property of either one or the other, shall be deemed the community or common property of the husband and the wife and each, subject to the provisions of the Act, shall be vested with an undivided one-half interest therein. The wife shall have the management and control and may dispose of that portion of the community property consisting of her earnings, all rents, interest, dividends, incomes and other profits for her separate estate and all other community property the title to which stands in her name. The husband shall have the management and control and may dispose of all other community property, provided, however, that the homestead, if community property, shall not be sold, encumbered, or otherwise disposed of, except in the manner as is provided by law prior to the enactment of this Act, and further provided, that any funds on deposit in any bank or banking institution, whether in the name of the husband or the wife, shall be presumed to be the separate property of the party in whose

name they stand, regardless of who made the deposit, and unless said bank or banking institution is notified to the contrary, it shall be governed accordingly in honoring checks and orders against such account.

SEC. 57. *Property as subject to debts or liabilities of spouses—Exemptions.*—The separate property of the wife and that portion of community property, record title to which is in her name or which is under the management, control and disposition of the wife, shall be subject to debts contracted by the wife arising out of tort, or otherwise, but not to debts or liabilities of the husband. The separate property of the husband and that portion of the community property, record title to which is in his name or which is under the management, control and disposition of the husband shall be subject to debts contracted by the husband or liabilities of the husband arising out of tort or otherwise, but not the debts or liabilities of the wife. The husband and the wife, and each of them, shall be entitled to the exemptions to which they, or either of them, are now entitled under the laws existing prior to the enactment of this Act.

SEC. 58. *Creditors' rights in community property.*—No creditor shall have recourse to the community property for the payment of debts or liabilities created by either the husband or the wife, except as provided in Section 7 of this Act, provided, however, that any creditor may satisfy his claim or demand out of the community property which was under the management, control and disposition of the spouse incurring the indebtedness or liability at the time the debt or liability was con-

tracted or created, and which has been subsequently conveyed or transferred to the other spouse and is under the management, control and disposition of said other spouse, without proof that said creditor relied upon said community property in advancing said credit, but without prejudice to the rights of the third party purchasers, incumbrancers, or other creditors or grantees; and provided further, that the husband or wife on paying community debts shall, as between themselves, charge the same against community property.

SEC. 59. *Conveyances between spouses of community property—Creditors' rights not affected.*—The husband may give, grant, bargain, sell or convey directly to his wife, and a wife may give, grant, bargain, sell or convey directly to her husband, his or her community right, title, interest or estate in all or any property of their community real or personal property. Every deed and conveyance made from the husband to the wife or from the wife to the husband shall operate to divest the property therein described of every claim or demand as community property, and shall vest the same in the grantee as the separate property of the grantee; provided, however, that the deeds, conveyances or transfers hereby authorized shall not affect any existing equity in favor of creditors of the grantor at the time of such transfer, gift or encumbrance.

SEC. 60. *Dissolution of marriage—Division of community property.*—In the event of the dissolution of marriage by decree of any court of competent jurisdiction, community property shall be divided between the parties by the court granting the decree, in such proportions as such court, from the facts in the case, shall deem just and equi-

table, and such division shall be subject to revision on appeal in all respects including the exercise of discretion by the court below.

SEC. 61. *Incapacity of spouse—Conviction—Abandonment—Habitual drunkard—Substitution of other spouse.*—Whenever the husband or the wife is non compos mentis, or had been convicted of a felony or sentenced to imprisonment for a period of more than one year, or whenever the husband has abandoned his wife and family and left her and his family, if they have children, without support, or whenever the husband or the wife is an habitual drunkard, or for any other reason is incapacitated to manage, control, or dispose of the community property, the other spouse may present a petition, duly verified, to the district court of the county wherein they reside, or if they are nonresidents wherein any of the community property is located or situated, stating the name of the incapacitated spouse, a description of all community property, both real and personal, and the facts which render the other spouse incapacitated to manage, control or dispose of the community property, and praying that the spouse filing the petition be substituted for the incapacitated spouse as to the management, control or disposition of the community property then under the management, control and disposition of said spouse with the same power of managing, controlling and disposing of the community property as was vested in the incapacitated spouse.

SEC. 62. *Service of process in proceedings for substitution of spouse.*—In all such cases service of process shall be had as in other civil actions, provided, however, that

where it is alleged that the other spouse is non compos mentis, a guardian ad litem shall be appointed having such powers as in other civil actions.

SEC. 63. *Hearing on petition for substitution—Judgment.* Upon the hearing of the petition so filed, the court shall render judgment therein either dismissing said petition or adjudging the spouse filing same to have such power of managing, controlling and disposing of the community property, either real or personal, formerly under the management, control and disposition of the other spouse as to the court may appear to be just, proper, equitable, and to the best interests of said estate.

SEC. 64. *Recording of judgment in proceeding for substitution.*—All judgments rendered as in the preceding Section provided shall be recorded in the office of the county clerk of the county where any property affected thereby is situated and such judgment when so rendered shall be notice of the facts therein set out.

SEC. 65. *Death of spouse—Administration of community property—Interest of survivor—Homestead.*—Upon the death of the husband or the wife, the surviving spouse shall administer all community property in the same manner and with the same duties, privileges, and authority as are vested in a surviving partner to administer and settle the affairs of a partnership upon the death of the other partner, as provided by Section 1197, Oklahoma Statutes, 1931; provided that the surviving husband or wife shall not be disqualified from acting as executor or administrator of the estate of the deceased husband or wife; and provided further, that the survivor of the

husband or wife shall pay out of the community property, except the homestead and exempt property, all debts of the community, whether created by the husband or the wife; and provided further, that when all debts of the community shall have been fully satisfied the survivor shall transfer and convey to the administrator or executor of the deceased one-half of the community property remaining to be administered and distributed as other property of the estate either subject to the terms of the will of the deceased or under the laws of descent and distribution as the case may be, and thereafter all the interest of the surviving partner in said community property shall be that of a tenant in common; and provided further, that any interest in a homestead so conveyed shall not be subject to administration under the laws of this State, except in the manner provided by law at the time of the enactment of this Act.

APPENDIX B

PROPERTY RIGHTS OF HUSBAND AND WIFE UNDER OKLAHOMA STATUTES [1]

SPOUSES NOT ELECTING COMMUNITY PROPERTY

(1) Apart from mutual obligation of support wife has no legal interest in husband's earnings or in income from his separate property, and husband has no legal interest in wife's earnings or in income from her separate property. Oklahoma Statutes Annotated, Title 32, Sections 3-4.

(2) Apart from the obligation of support the husband's earnings and the income from his separate property are not subject to the wife's debts, and the wife's earnings and the income from her separate property are not subject to the husband's debts. Title 32, Section 9; *Baker* v. *Witten*, 1 Oklahoma 160.

(3) The spouses may contract with each other respecting their property rights. Title 32, Section 5.

SPOUSES ELECTING COMMUNITY PROPERTY

(1) Apart from mutual obligation of support wife can assert no right in husband's earnings or in income from his separate property, and husband can assert no right in wife's earnings or the income from her separate property. Title 32, Section 56.

(2) Apart from the obligation of support the husband's earnings and the income from his separate property are not subject to the wife's debts, and the wife's earnings and the income from her separate property are not subject to the husband's debts. Title 32, Sections 57 and 58.

(3) Spouses may "give, grant, bargain, sell or convey" directly to each other any community right, title, interest or estate. Title 32, Section 59.

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[1] Citations are to the Oklahoma Statutes Annotated.

(4) In the event of divorce the wife may have alimony in such amount as the court may deem just and equitable. With respect to property acquired by the parties jointly during their marriage "whether the title thereto be in either or both of said parties, the court shall make such division between the parties respectively as may appear just and reasonable." Title 12, Section 1278.	(4) In the event of divorce community property shall be divided between the parties, in such proportion as the court from the facts in the case shall deem just and equitable. Title 32, Section 60. The election of the community rather clearly does not affect the wife's right to alimony under the general statutes.
(5) On imprisonment or abandonment of one spouse the other may by court action succeed to the management and control of the other's property. Title 32, Section 13.	(5) On the incapacity of or abandonment by one spouse the remaining spouse may by court action be substituted to manage, control, and dispose of the community property formerly managed, etc., by the other. Title 32, Section 61.
(6) If not more than one child, one-half of the estate goes to surviving spouse. If more than one child then surviving spouse takes a one-third share. Title 84, Section 213. No spouse can defeat the other's right of intestate succession by will. Title 84, Section 44.	(6) On death of one spouse one-half of the community property after payment of community debts goes to the survivor. The other half passes under the terms of the deceased's will or under the laws of descent and distribution. Title 32, Section 65.

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